

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

American Farm Bureau Federation,
National Pork Producers Council

Plaintiffs,

v.

U.S. Environmental Protection Agency
Gina McCarthy,
*Administrator of the U.S. Environmental
Protection Agency,*

Defendants,

and

Food & Water Watch, Environmental
Integrity Project, and Iowa Citizens for
Community Improvement,

Intervenors.

Case No. 13-CV-1751 (ADM/TNL)

DECLARATION OF DEBORAH NAGLE

I, Deborah G. Nagle, declare under penalty of perjury that the following statements are true and correct to the best of my knowledge and belief:

1. I am Director of the Water Permits Division ("WPD") within the Office of Water's Office of Wastewater Management of the U.S. Environmental Protection Agency ("EPA" or "Agency"). I have been in this position since July 3, 2011, and served as Acting Director for the WPD seven months prior to that date. I have worked at the EPA for approximately twenty-five years. As the Director of the WPD, I direct the EPA Division responsible for implementing the

National Pollutant Discharge Elimination System (“NPDES”) permit program under the Clean Water Act (“CWA” or “Act”). The WPD provides oversight of authorized state and territorial NPDES programs and technical assistance to support EPA regional water programs. The WPD is also responsible for developing national policy, regulations, and technical implementation guidance to effectively implement the NPDES program, which includes concentrated animal feeding operations (“CAFOs”). My responsibilities as the Director of the WPD include, among other things, oversight of program staff responding to Freedom of Information Act (“FOIA”) requests.

2. The purpose of this Declaration is to describe the process the EPA followed in responding to two FOIA requests from (1) Earthjustice (EPA-HQ-2012-001337) and (2) the Pew Charitable Trusts and the Natural Resources Defense Council (“NRDC”) (EPA-HQ-2013-001516), and to provide an explanation of EPA’s decision to withhold and release certain information responsive to the two requests. I will also provide a brief background on the main subject of the FOIA requests: records related to EPA’s *Proposed NPDES CAFO Reporting Rule*, 76 Fed. Reg. 65,431 (October 21, 2011) (“Proposed CAFO Reporting Rule”); subsequent *Withdrawal of the Proposed NPDES CAFO Reporting Rule*, 77 Fed. Reg. 42,679 (July 20, 2012) (“Withdrawal”); and EPA’s effort to collect and evaluate CAFO information that would inform the Agency’s efforts to more effectively implement the CWA.

3. My statements in this Declaration are based on information provided to me by employees under my supervision, information obtained by me in performance of my official duties, and my personal examination of withheld documents. I am personally familiar with the two original FOIA requests and seven subsequent FOIA requests, which are at issue in this civil action. I submit this declaration to serve as the administrative record in the above-captioned lawsuit.

I. BACKGROUND: RELEVANT STATUTORY REQUIREMENTS UNDER THE CLEAN WATER ACT

4. *The Clean Water Act*. The CWA establishes a comprehensive program designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Section 501 authorizes the EPA Administrator to promulgate rules to carry out the Administrator’s functions under the CWA. 33 U.S.C. § 1361.

5. Section 101(e) of the CWA requires that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.” 33 U.S.C. § 1251(e).

6. Section 104 of the CWA requires the EPA to, “in cooperation with other Federal, State, and local agencies, conduct and promote ... surveys, and studies” relating to the causes and prevention of pollution, and authorizes the Agency to “collect and make available, through publication and other appropriate means, the results of” such surveys and studies. 33 U.S.C. §§ 1254(a)(1), (b)(1). Section 104 specifically charges the Agency with conducting “public investigations concerning the pollution of any navigable waterbody,” and requires it to “report on the results of such investigations.” *Id.* at § 1254(a)(3). The EPA is also authorized to “collect and disseminate” information about “pollution and the prevention, reduction, and elimination thereof.” *Id.* at § 1254(b)(6).

7. Section 301(a) of the CWA prohibits the discharge of pollutants from a “point source” to waters of the United States, except as authorized under the Act. 33 U.S.C. § 1311(a). The term “CAFO” is specifically included in the definition of “point source.” 33 U.S.C. § 1362(14).

Discharges may be authorized through a NPDES permit. 33 U.S.C. § 1342. NPDES permits authorize and regulate the discharge of pollutants from point sources to waters of the United States. Id.

8. Section 308 of the CWA authorizes the EPA to collect information from the “owner or operator of any point source” to:

carry out the objective of [the CWA], including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out [sections 305, 311, 402, 404 (relating to State permit programs), 405, and 504 of the CWA].

33 U.S.C. § 1318(a). In furtherance of these stated objectives, the EPA may require owners or operators of point sources to establish and maintain records; make reports; install, use, and maintain monitoring equipment; sample effluents; and provide such other information as the EPA may reasonably require to carry out the objectives of the Act. 33 U.S.C. § 1318(a)(4)(A). Any records, reports, or information obtained under section 308 of the CWA “shall be available to the public,” except upon a satisfactory showing that the information (other than effluent data) is entitled to protection as trade secrets in accordance with the Trade Secrets Act, 18 U.S.C. § 1905.

9. Section 402 of the CWA requires that each NPDES permit application and each permit issued be available to the public and be available upon request for the purpose of reproduction. 33 U.S.C. §§ 1342(b)(3), (j). The NPDES regulations implementing this statutory public notice requirement outline detailed public availability requirements for individual permit applications and public notice and comment requirements for notices of intent to discharge under a general permit. 40 C.F.R. §§ 122.23(h), 124.10-17. The permitting authority must make available an individual permit application and circulate a notice of intent to discharge under a

general permit as well as a draft nutrient management plan for public comment. 40 C.F.R. §§ 122.23(h), 124.10. The permitting authority must respond to significant comments received and may revise the permit or require the CAFO owner or operator to revise the nutrient management plan in light of public comments. 40 C.F.R. §§ 122.23(h); see also 124.14, 124.17. The permitting authority must then inform the public whether general permit coverage is granted and of the terms of the nutrient management plans incorporated as terms and conditions of the permit. 40 C.F.R. §§ 122.23(h); see also 124.15.

10. All NPDES permit applications for CAFOs must include the following: (1) the name of the owner or operator; (2) facility location and mailing address; (3) latitude and longitude of the production area (entrance of the production area); (4) a topographic map of the geographic area in which the CAFO is located showing the specific location of production area; (5) specific information about the number and type of animals, whether in open confinement or housed under roof; (6) the type of containment and storage and total capacity for manure, litter, or process water; (7) the total number of acres under control of the applicant available for land application of manure, litter, or process wastewater; (8) estimated amounts of manure, litter, and process wastewater generated per year; (9) estimated amounts of manure, litter, and process wastewater transferred to another person per year; and (10) a nutrient management plan that at a minimum satisfies requirements in 40 CFR § 122.42(e). 40 C.F.R. §§ 122.21(i), 122.23(d).

11. The CWA provides that states, tribes, and territories may be authorized to administer the NPDES program. 33 U.S.C. § 1342(a), (b); 40 C.F.R. Part 123. States, tribes, or territories authorized to administer the permit program must have adequate legal authority to implement the CAFO permit application provisions listed in Paragraphs 9 and 10, above, and must administer the program in conformance with the requirements of Part 123, except that pursuant to section

510 of the CWA, states, tribes, or territories may impose more stringent requirements. 33 U.S.C. § 1370, 40 C.F.R. §§ 123.25(a)(4) (requiring that state programs have legal authority to implement § 122.21(i)); 123.25(a)(11) (requiring that states choosing to issue general permits have legal authority to implement § 122.28); 123.25(a)(13) (requiring that state programs have legal authority to implement § 122.42); 40 C.F.R. § 123.1(i) (not precluding more stringent or more extensive requirements than required under Part 123). Forty-six states and the Virgin Islands are authorized to implement the NPDES permitting program.

12. The regulations implementing the CWA state permit program requirements provide that authorized states must have the ability and appropriate procedures in place to maintain a comprehensive inventory of all sources subject to NPDES permitting requirements. 40 C.F.R. § 123.26. Also, such states must have a program capable of making comprehensive surveys of all facilities and activities subject to their authority to identify persons subject to regulation. Id. Any information obtained or used in the administration of a state program is available to the EPA upon request without restriction. 40 C.F.R. § 123.41(a); see also 40 C.F.R. § 123.26(a)(1). If the EPA obtains information from a state that is not claimed to be confidential, the EPA may make that information available to the public without further notice. 40 C.F.R. § 123.41(a); see also 40 C.F.R. § 122.7(b) (stating that claims of confidentiality for any information on permit applications, or effluent data, shall be denied).

II. BACKGROUND: AGRICULTURAL OPERATIONS IN THE UNITED STATES

13. According to EPA's most recent National Water Quality Inventory, agriculture is the leading probable source of impairments in the nation's assessed rivers and streams. See National Summary of Assessed Waters Report, available at:

http://ofmpub.epa.gov/waters10/attains_nation_cy.control. Livestock manure, whether from poultry, cattle, or swine, contains substantial amounts of nutrients (nitrogen, phosphorus, and potassium), pathogens, and heavy metals, and smaller amounts of other elements and pharmaceuticals, which can harm aquatic ecosystems as well as human health. 76 Fed. Reg. at 65,433-34. When the EPA revised its NPDES CAFO regulations in 2003, the Agency estimated that animal feeding operations (“AFOs”) annually produce more than 500 million tons of animal manure and that the revised regulations would yield incremental pollutant reductions annually of 2.1 billion pounds of sediment, 155 million pounds of nutrients, and one million pounds of metals. 68 Fed. Reg. at 7,176, 7,224 (Feb. 12, 2003).

14. The United States has approximately one million farms with livestock. See U.S. Department of Agriculture, 2007 Agricultural Census, available at http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/nra/dma/?&cid=nrcs143_014121. Approximately 18,000 of these operations are CAFOs – operations that confine animals for at least forty-five days per year, meet certain numeric thresholds, or other criteria. See 40 C.F.R. § 122.23(b)(2) and EPA NPDES CAFO Program Implementation Status Report, available at http://www.epa.gov/npdes/pubs/afo_tracksum_endyear2012.pdf. On a 1,000 pound live weight basis, an animal produced for livestock or poultry production generates more waste than a human. See U.S. EPA Risk Management Evaluation for Concentrated Animal Feeding Operations; EPA-600-R-04-042 (May 2004) at 9, available at <http://nepis.epa.gov/Adobe/PDF/901V0100.pdf>. The waste generated from a dairy CAFO with 1,000 animal units is equivalent to the waste generated by a city of 164,500 people. Id. In its 2008 report on CAFOs, the U.S. Government Accountability Office (“GAO”) estimated that a swine operation with 800,000 hogs would generate “more than 1.6 million tons of manure

annually—more than one and a half times the sanitary waste produced by the about 1.5 million residents of Philadelphia, Pennsylvania, in one year.” U.S. Gov’t Accountability Office, Concentrated Animal Feeding Operations—EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality, GAO-08-977 (2008) at 5, available at <http://www.gao.gov/new.items/d08944.pdf>.

III. BACKGROUND: EPA’S EFFORTS TO COLLECT INFORMATION ABOUT CAFOs.

15. *2008 GAO CAFO report*. In September 2008, the GAO issued a report to congressional requesters, recommending that the EPA “should complete the Agency’s effort to develop a national inventory of permitted CAFOs and incorporate appropriate internal controls to ensure the quality of the data.” U.S. Gov’t Accountability Office, Concentrated Animal Feeding Operations—EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality, GAO-08-977 5 (2008) at 48, available at <http://www.gao.gov/products/GAO-08-944>. In the report, the GAO reviewed EPA’s information on permitted CAFOs and determined that the information obtained from state agencies “are inconsistent and inaccurate and do not provide [the] EPA with reliable information it needs to identify and inspect permitted CAFOs nationwide.” *Id.* at 17. In response to GAO’s recommendations, the EPA stated that it was developing proposed national standards for NPDES information that authorized states would provide to the EPA, which might include obligations for authorized states to provide information on permitted CAFOs as well as facilities that are required to have permits but do not. *Id.* at 76-77.

16. *2008 revisions to the CAFO NPDES permit regulations, litigation, and settlement.*

In 2008, the EPA revised its CAFO NPDES permit regulations in response to a decision of the U.S. Court of Appeals for the Second Circuit, Waterkeeper Alliance et al. v. EPA, 399 F.3d 486 (2d Cir. 2005). 73 Fed. Reg. 70,418 (Nov. 20, 2008). Changes included requiring only those CAFOs that discharge or propose to discharge to obtain a NPDES permit. *Id.* Both environmental and industry organizations filed petitions for review of the 2008 rule, which were consolidated in the U.S. Court of Appeals for the Fifth Circuit. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011). On May 25, 2010, the EPA signed a Settlement Agreement with the environmental petitioners to resolve their claims. Exhibit 1, May 25, 2010, Settlement Agreement between the EPA and Environment Petitioners. In the Settlement Agreement, the EPA committed to propose a rule to require all owners or operators of CAFOs, whether or not they have NPDES permits, to submit certain information to the EPA, and to take final action on the proposed rule by May 25, 2012. *Id.* at ¶ 2. The Settlement Agreement did not commit the EPA to the substance of any final action. *Id.* at ¶ 7. The Settlement Agreement was subsequently amended on May 25, 2011, to extend the deadline for the signature on the proposal to October 14, 2011, and the final action date to July 13, 2012. Exhibit 2, May 25, 2011, Modification of May 25, 2010 Settlement Agreement.

17. On March 15, 2011, the Fifth Circuit Court of Appeals vacated the requirement in EPA's 2008 CAFO NPDES permit regulations that CAFOs "proposing" to discharge obtain NPDES permits and held that CAFOs are not liable, under the enforcement provision of the Act, 33 U.S.C. § 1319, for failing to apply for NPDES permits as a distinct violation from discharging without a permit. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d at 756. The Fifth Circuit

held that there must be an “actual discharge to trigger the CWA requirement to obtain a permit.”

Id. at 751.

18. *The Proposed NPDES CAFO Reporting Rule and its Withdrawal.* On October 21, 2011, the EPA proposed to collect certain information about CAFOs in the Proposed CAFO Reporting Rule. The EPA proposed that it would collect the following five types of information: (1) contact information for the CAFO owner or authorized representative; (2) location of the CAFO’s production area identified by the latitude and longitude or by the street address; (3) whether the CAFO has applied for and/or received coverage under an NPDES permit; (4) for the previous 12-month period, identification of each animal type confined and the maximum number of each animal type confined at the CAFO; and (5) at CAFOs that land apply manure, litter, and process wastewater, the total number of acres under the control of the owner or operator available for land application. 76 Fed. Reg. at 65,437.

19. The Proposed CAFO Reporting Rule intended to improve and restore water quality by collecting facility-specific information so that the EPA could better implement the CWA. Id. at 65,431. The EPA explained that this Rule would promote transparency and provide a comprehensive body of information that would serve as a basis for sound decisionmaking. Id. at 65,435. Unlike many other regulated industries in the United States, the EPA did not have facility-specific information for all CAFOs in the United States. In the proposal, the EPA explained that facility location and basic operational characteristics that relate to how and why a facility may discharge is essential information needed to carry out its obligations under the CWA. Id. at 65,436. The information would assist the EPA in: (1) evaluating the NPDES program effectiveness; (2) identifying and permitting CAFOs that discharge; (3) conducting education and outreach to promote best management practices; (4) determining potential sources

of water quality impairments and taking steps to address those impairments; (5) estimating loadings from CAFOs —by facility, watershed, or other geographical area; and (6) targeting resources for compliance assistance or enforcement. Id. at 65,436. The EPA stated that information gathered would help the EPA to ensure that CAFOs are complying with the requirements of the CWA, including the requirement to obtain an NPDES permit if they discharge pollutants to waters of the United States. Id. It would also directly address the GAO's recommendations for obtaining adequate information relevant to EPA's CAFO program. See ¶ 15 of this Declaration.

20. The EPA received approximately 1,403 comment letters on the Proposed CAFO Reporting Rule from states, state associations, industry organizations, environmental groups, and individuals, all of which are publicly available at www.regulations.gov, in Docket EPA-HQ-OW-2011-0188. Industry commenters opposed the Proposed Rule by arguing, among other things, that much of the information sought had already been submitted to the states and the EPA, and the information could be collected through means other than the Proposed Rule. Exhibit 3, Letter from American Farm Bureau Federation and National Pork Producers Council to the EPA, January 19, 2012. States commented that state permitting authorities, or other state agencies, have information about CAFOs and that much of the information sought is publicly available. Exhibit 4, Letter from the South Dakota Department of Agriculture and South Dakota Department of Environment and Natural Resources, December 22, 2011; and Letter from the New York Department of Environmental Conservation and Department of Agriculture, January 19, 2012. Some states also commented that they had additional CAFO information beyond the five types of information proposed to be collected, including information from permit applications and information about animal feeding operations ("AFOs") that are not defined as

CAFOs. Exhibit 5, Letter from the Maryland Department of the Environment, January 19, 2012; and Letter from the South Carolina Department of Health and Environmental Control, January 13, 2012.

21. The EPA published the Withdrawal of the Proposed CAFO Reporting Rule on July 20, 2012. 77 Fed. Reg. at 42,679, attached as Exhibit 6. In explaining the reasons for the Withdrawal, the EPA stated that, where appropriate, it intended to collect CAFO information using existing sources of information, including state NPDES programs and other programs at the federal, state, and local level. *Id.* At the time of the Withdrawal, the EPA decided that it was more appropriate to obtain CAFO information by working with federal, state, and local partners instead of requiring CAFO information to be submitted pursuant to a rule. *Id.* at 42,681.

22. In the Withdrawal notice, the EPA explained that it could obtain facility-specific information from authorized state permitting agencies, often on websites that the permitting authorities maintain. Prior to the Withdrawal, the EPA had found facility-specific information for over 7,000 operations on states' websites. *Id.* The EPA explained that beyond what was found from these websites, information exists in state NPDES permitting records, and states would share that information with the EPA. *Id.* at 42,681-82. Under EPA regulations, authorized states are required to allow the EPA to routinely review state records, reports, and files relevant to the administration and enforcement of the approved program. 40 C.F.R. §§ 123.41(a), 123.43.

23. *The Memorandum of Understanding ("MOU") Between the EPA and the Association of the Clean Water Administrators ("ACWA")*. In July 2012, the EPA established a MOU with ACWA, entitled "Memorandum of Understanding Between the U.S. Environmental Protection Agency and Association of Clean Water Administrators; Collaborative Efforts to Collect and Exchange Information About Concentrated Animal Feeding Operations," attached as

Exhibit 7, to assist the Agency in collecting CAFO information. ACWA is an independent, nonpartisan, non-profit corporation of state and interstate water program managers. Pursuant to the MOU, ACWA agreed to foster a dialogue between ACWA members and the EPA to facilitate the exchange of CAFO information. The collaborative effort between the EPA and ACWA focused on assisting the EPA to obtain pertinent information about CAFOs from NPDES authorized states on a state-by-state basis. As part of its MOU responsibilities, ACWA helped the EPA set up telephone calls with state employees. Exhibit 8, November 16, 2012, MOU with ACWA: CAFO Information – Implementation Workplan. ACWA did not participate in any of the EPA-led telephone calls with states.

24. *EPA's effort to collect publicly accessible CAFO Information prior to proposing the CAFO Reporting Rule.* Prior to proposing the CAFO Reporting Rule, the EPA retrieved CAFO information directly from its own data systems and websites to determine the amount and type of information states already were sharing electronically with the Agency and the amount of information the EPA still found appropriate to request in the Proposed CAFO Reporting Rule. See 76 Fed. Reg. at 65,431. Review of this information informed EPA's decision to develop the voluntary state submission process and the alternative approach that relies on existing information sources in the Proposed CAFO Reporting Rule. Id. at 65,437. The EPA included examples of CAFO site-specific information that was publicly available on the Internet in Docket EPA-HQ-OW-2011-0188-0010.

25. The EPA retrieved CAFO information from two national NPDES data systems: the Integrated Compliance Information System-NPDES ("ICIS-NPDES") and the Permit Compliance System ("PCS"). During the time that the EPA was considering the Proposed CAFO Reporting Rule, the majority of states provided information to ICIS-NPDES, but some

provided information to PCS. (PCS was phased out and replaced by ICIS in December 2012.) Much of the information from ICIS-NPDES and PCS was available to the public in a different format via Enforcement and Compliance History Online (“ECHO”). ECHO does not provide any ICIS-NPDES or PCS information that is categorized as (1) confidential business information, (2) related to an ongoing enforcement action, or (3) associated with inspection planning. The ECHO website provides publicly available facility information from the previous three years, including facility names, locations, permit information, inspections, violations, enforcement actions (completed actions only), and penalties. Any member of the public with access to the Internet can retrieve information from ECHO. See <http://echo.epa.gov/?redirect=echo>.

27. *EPA’s effort to collect publicly accessible CAFO information prior to the Withdrawal of the Proposed the CAFO Reporting Rule.* After proposing the CAFO Reporting Rule, the EPA conducted a preliminary evaluation of information publicly available on the Internet from all state permitting authorities, expanding on the effort the Agency had conducted prior to issuing the Proposed Rule. EPA’s post-proposal evaluation of available information included a review of thirty-seven state permitting authorities’ websites to determine if information about CAFOs was publicly accessible. See Exhibit 6, 77 Fed. Reg. at 42,681. The EPA summarized the results of this evaluation in a document titled, “CAFO 308 Rule Information Search,” which is available in the Proposed CAFO Reporting Rule’s docket, EPA-HQ-OW-2011-0188-1435.

28. *EPA’s effort to collect publicly accessible CAFO information after the Withdrawal of the Proposed CAFO Reporting Rule.* In its Withdrawal of the Proposed CAFO Reporting Rule, the EPA discussed the MOU it had entered with ACWA and indicated it would collect

publicly accessible CAFO data using existing sources of information, such as state NPDES authorized programs, as well as state and local governments. See Exhibit 6, 77 Fed. Reg. at 42,681. By May 2012, the EPA began conducting telephone calls with authorized state CAFO permitting agencies to discuss the availability of CAFO information. Prior to each state call, the EPA reviewed any CAFO information that was maintained in EPA's Regional Offices. If the EPA Region had CAFO information, it was discussed with the state employee during the telephone call. As a result of these Regional discussions, the EPA obtained EPA Region 3's information about poultry facilities in the Delmarva Peninsula, which included poultry facilities from Delaware, Maryland, and Virginia. EPA Region 3 derived this consolidated list from its enforcement activities, such as field investigations and online research of publicly available databases. The EPA Region 3 information also contained CAFO information from federal and state permits. The EPA also obtained CAFO information pertaining to Illinois, Michigan, and Wisconsin from EPA Region 5, which received this information from those state employees as part of the Agency's monitoring and evaluation of states' implementation of the NPDES permitting programs.

29. To ensure an informed discussion with each state, the EPA shared an agenda with each state CAFO permitting agency and requested that a state agency staff person who works in permitting as well as a staff person who manages CAFO information participate on the conference call. Exhibit 9, Proposed Agenda and Sample EPA Email to State Employees. During each conference call, the EPA asked whether the state would share its CAFO information with the Agency.¹ The EPA also inquired whether the information the state was sharing was

¹ Although the EPA only asked states for information about CAFOs, some states sent additional information about non-CAFO facilities as well (often because the state stored CAFO and non-CAFO information in the same Excel spreadsheets.) For the sake of convenience, this document refers to information received from states in response to EPA's requests for CAFO information as "CAFO information."

publicly available and, if so, the way in which the public can access the information. In requesting this information, the EPA explained to each state employee that any records shared with the Agency are subject to the FOIA unless a privilege was asserted, such as the information is confidential business information. Id. The EPA did not receive any privilege claims and was informed by state employees that all information shared with the Agency was publicly available. By January 14, 2013, the EPA had conducted forty-four conference calls with state employees to determine what CAFO information was available from each state. As a result of these calls, the EPA received CAFO information from twenty-seven states.²

30. After completing the conference calls with the states, the EPA collected publicly accessible CAFO information from eight states' websites.³ In addition, the EPA specifically searched PCS for facilities in Maine and searched ICIS-NPDES for facilities in New York because those states referred the EPA to these data systems for their CAFO information. The information the EPA retrieved from the EPA and state websites was available to the public at the time the EPA retrieved it. More information pertaining to the data systems and the state websites is provided in Paragraphs 55-57 of this Declaration. The EPA subsequently compared the CAFO information it had received from the states and retrieved from the states' websites with information retrieved from the PCS, ICIS-NPDES, and ECHO searches done prior to withdrawing the Proposed CAFO Reporting Rule to identify information gaps.

² The twenty-seven states that provided CAFO information, as a result of state calls, are Alabama, Arizona, California, Colorado, Florida, Georgia, Indiana, Idaho, Iowa, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Washington, Wisconsin, and Wyoming. Please note that CAFO information pertaining to Illinois was obtained from EPA Region 5, which received the information as part of the response to the petition to withdraw Illinois NPDES program. See ¶ 59(d) of this Declaration.

³ The eight states are Alabama, Arkansas, Florida, Louisiana, Maryland, Mississippi, New Jersey, and Texas.

III. FOIA REQUESTS AND EPA'S RESPONSE

31. *Earthjustice FOIA request.* Earthjustice submitted a FOIA request (EPA-HQ-2012-001337), dated September 11, 2012, to the EPA seeking records relating to the Proposed CAFO Reporting Rule. Earthjustice's FOIA request is attached to this Declaration as Exhibit 10. The FOIA request sought the following six categories of information:

1. All records, including all communications, shared or otherwise maintained between EPA and any other government agency (including, but not limited to, the United States Department of Agriculture and/or the United States Geological Survey) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule;
2. All records reflecting any communication, written or verbal, between the EPA and any private party, corporation or non-profit organization (including, but not limited to, the National Pork Producers Council, the American Farm Bureau Federation, the National Chicken Council, the U.S. Poultry & Egg Association, the National Milk Producer's Federation) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule;
3. All records created or updated since November 28, 2008, relating to EPA's evaluation of information publicly available about CAFOs in the United States[;]
4. All records, including, but not limited to, all communications and records identifying, discussing, mentioning, describing, reporting or analyzing the July 2012 memorandum of understanding (MOU) entitled "Collaborative Efforts to Collect and Exchange Information about Concentrated Animal Feeding Operations" entered between EPA and the Association of Clean Water Administrators;
5. All records relating to how EPA will obtain information about CAFOs in states for which current site-specific information about CAFOs is not available on the internet, including, at a minimum, CAFOs in Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Puerto Rico, U.S. Virgin Islands, West Virginia, Georgia, Illinois, Minnesota, Kansas, Nevada, Alaska, Idaho, and Washington;
6. All records relating to and/or identifying existing sources of information about CAFOs, including the AFOs themselves, and EPA's proposed and intended data collection process for gathering that information.

32. *The Pew Charitable Trusts and NRDC's FOIA request.* The Pew Charitable Trusts and NRDC ("Pew-NRDC") submitted a FOIA request (EPA-HQ-2013-001516), dated October

24, 2012, to the EPA and sought all records relating to EPA's Withdrawal and information collection effort. The FOIA request is attached to this Declaration as Exhibit 11. The Pew-NRDC FOIA request sought the following information:

1. Any records pertaining to the Reporting Rule that are not contained in the public docket for the rule that were submitted to EPA by: The American Farm Bureau Federation, The National Pork Producers Council, The National Cattlemen's Beef Association, The United Egg Producers, The U.S. Poultry & Egg Association, The National Council of Farmer Cooperatives, The National Milk Producers Federation, The National Chicken Council, the National Turkey Federation, The National Corn Growers Association, or any other agricultural trade association.
2. Any records providing factual information concerning the completeness, accuracy, and public accessibility of states' CAFO information in the following areas:
 - a. The legal name of the owner of the CAFO or an authorized representative, their mailing address, email address, and primary telephone number,
 - b. The legal name and address of the owner/operator, if the name and address of an authorized representative is provided above,
 - c. The location of the CAFO's production area, identified by latitude and longitude and street address,
 - d. If the owner or operator has NPDES permit coverage, the date of issuance of coverage under the NPDES permit, and the permit number,
 - e. For the previous 12-month period, identification of each animal type confined either in open confinement including partially covered area, or housed totally under roof at the CAFOs for 45 days or more, and the maximum number of each animal type confined at the CAFO for 45 days or more,
 - f. Where the owner or operator land applies manure, litter and process wastewater, the total number of acres under the control of the owner or operator available for land application,
 - g. If the CAFO is a contract operation, the name and address of the integrator,
 - h. Type and capacity of manure storage used at the CAFO,
 - i. Quantity of manure, process wastewater, and litter generated annually by the CAFO,
 - j. If the CAFO land-applies, whether it implements a nutrient management plan for land application,
 - k. If the CAFO land applies, whether it employs nutrient management practices and keeps records on site consistent with 40 CFR 122.23(e),
 - l. If the CAFO does not land apply, alternative uses of manure, litter and/or wastewater, and
 - m. Whether the CAFO transfers manure off site, and if so, the quantity transferred to recipient(s) of transferred manure.
3. Any records that provide any of items 2.a-m, above, for any CAFO in the U.S.

33. *EPA's initial response to the Earthjustice and Pew-NRDC FOIA requests.* The EPA provided an interim, partial response to Earthjustice's FOIA request on October 16, 2012. Exhibit 12, October 16, 2012 Interim Response to Earthjustice's FOIA request. On December 18, 2012, the EPA provided an interim, partial response to the Pew-NRDC FOIA request. Exhibit 13, December 18, 2012 Interim Response to Pew-NRDC's FOIA Request. Since both FOIA requests sought similar records, the EPA provided the same sixty-one records in these interim, partial responses, which comprised information pertaining to the Proposed CAFO Reporting Rule and its Withdrawal that was not in the public docket. On January 25, 2013, Pew-NRDC denied EPA's request for an additional extension to respond to their October 24, 2012 FOIA request. Exhibit 14, January 25, 2013, Pew-NRDC Denial of Request for Extension.

34. On January 31 and February 4, 2013, the EPA issued its initial response to Earthjustice and the Pew-NRDC FOIA requests.⁴ Exhibit 15, January 31 and February 4, 2013, Initial Response. In the initial response letters, the EPA withheld 474 records in full under FOIA Exemption 5's deliberative process and attorney-client privileges. 5 U.S.C. § 552(b)(5). The EPA also partially granted the FOIA requests by providing the requesters a compact disk containing, among other things, CAFO information, the information the Agency received directly from the twenty states (listed below in (d) of Paragraph 35), as well as other CAFO information collected from states' public websites, EPA Regional Offices, and EPA's data systems.

⁴ EPA's January 31 and February 4, 2013 FOIA responses were actually titled "partial" responses because those responses did not include certain email and other records related to the Withdrawal of the Proposed CAFO Reporting Rule, responses for which the requesters had granted extensions. Because these emails and other records related to the Withdrawal are not at issue in this case, for convenience's sake, this document simply refers to the January 31 and February 4, 2013 responses as "initial responses."

35. *CAFO information released in the Agency's "initial response."* In its January 31 and February 4 "initial response," the EPA released the following information, attached as Exhibit 16, based on the understanding that this information was publicly available:

- a. Information collected from eight states' websites⁵ (Exhibit 16A): Alabama, Arkansas, Florida, Louisiana, Maryland, Mississippi, New Jersey, and Texas.
- b. Information collected from EPA data systems, ICIS-NPDES and PCS (Exhibit 16B): New York, Maine, and other consolidated spreadsheets.
- c. Information collected from EPA Regional Offices (Exhibit 16C): EPA Region 3's consolidated spreadsheet of poultry facilities from Delaware, Maryland, and Virginia and Region 5's consolidated spreadsheet of facilities in Illinois, Michigan, and Wisconsin.⁶
- d. Information collected from twenty states (Exhibit 16D): Alabama, Arizona, Colorado, Florida, Georgia, Indiana, Iowa, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Wisconsin, Wyoming, and Montana.

36. *The EPA gives notice of its FOIA responses to Agriculture Stakeholders.* As a courtesy, Ms. Ellen Gilinsky, Senior Policy Advisor in the EPA Office of Water, transmitted an email on February 11, 2013, to some Agriculture Stakeholders, informing them that the EPA had responded to the Earthjustice and Pew-NRDC FOIA requests by releasing CAFO information that was publicly available. Exhibit 17, February 11, 2013 EPA Email to Agricultural Stakeholders. Plaintiffs' representatives were included in the distribution list of this email. The

⁵ The EPA received Alabama and Florida CAFO information from state employees, as well as obtained information directly from the state website.

⁶ In addition to receiving CAFO information from Region 5, the EPA also received CAFO information directly from the state employees of Michigan and Wisconsin.

EPA also held meetings with agricultural stakeholders in February 2013 to discuss the FOIA responses.

37. *February 25, 2013 response from the Agriculture Stakeholders.* The Agriculture Stakeholders⁷ responded to EPA's FOIA responses in a letter dated February 25, 2013, attached as Exhibit 18. In this letter, the Agriculture Stakeholders expressed concern over the release of CAFO information. They stated that the release included information on "livestock and poultry farms and ranches of all sizes, from large CAFOs to the smallest of farms, many of which are maintained in state databases solely under state laws." *Id.* at 1. The Agricultural Stakeholders also stated that the farmers and ranchers live in close proximity to their animals. The Agricultural Stakeholders objected "to the release of [CAFO information] for possible use by groups who oppose our members' businesses and way of life for reasons largely, if not entirely, unrelated to the honorable goals and objectives of the [CWA]." *Id.* at 1. Finally, the Agriculture Stakeholders expressed privacy and security concerns regarding the release of the CAFO information. *Id.* at 2.

38. *The EPA responds to the Agriculture Stakeholders' February 25 letter.* On February 28, 2013, Ms. Nancy Stoner, Acting Assistant Administrator of the EPA Office of Water, sent a letter responding to the Agriculture Stakeholders, attached as Exhibit 19. The EPA acknowledged the Agriculture Stakeholders' concerns and committed to reviewing the issues raised in the February 25 letter. In this response, the EPA provided background context on the information collection efforts by explaining that it was EPA's understanding based on EPA's conversations with the states and EPA's regional staff that the information received, and

⁷ American Farm Bureau Federation, National Cattlemen's Beef Association, National Council of Farmer Cooperatives, National Chicken Council, National Pork Producers Council, National Turkey Federation, United Egg Producers, and US Poultry and Egg Association.

subsequently released, was all publicly available, either through a publicly accessible database or through a public records request to each state. Because of this understanding, all CAFO information included in the FOIA response was released in the same format and content in which the EPA received it. Nonetheless, prompted by the Agricultural Stakeholders' concerns, the EPA informed the Agriculture Stakeholders that it would investigate whether the FOIA releases contained additional information that was not readily available to the public from states or other sources and that raised privacy concerns under the FOIA. *Id.* As the Agency investigated this matter, the EPA asked the FOIA requesters to agree to refrain from further dissemination of information in the FOIA responses, and the requesters agreed. The EPA also provided the Agriculture Stakeholders copies of the Agency's initial response to the Earthjustice and Pew-NRDC FOIA requests.

39. *The Agriculture Stakeholder's response to EPA's February 28 letter.* On March 22, 2013, the Agriculture Stakeholders responded to EPA's February 28 letter, attached as Exhibit 20. In their letter, the Agriculture Stakeholders asserted that EPA's actions were inconsistent with the Agency's privacy policies and its obligations under the FOIA and the Privacy Act of 1974. *Id.* at 1. Specifically, the Agriculture Stakeholders asserted that the initial response violated the Agency's FOIA and Privacy Act policies, the EPA had failed to apply the balancing test required by the FOIA Exemption 6, and the released CAFO information was subject to additional protection under the Privacy Act. *Id.* at 3-5.

40. The Agriculture Stakeholders concluded their response by requesting the Agency take the following steps: (1) acknowledge that personal information in the FOIA release violated the FOIA, Privacy Act, and related policies; (2) agree that personal information in the releases would not be posted on EPA's website or otherwise disseminated; (3) release to the Agriculture

Stakeholders any and all records related to the Agency's understanding that the states' CAFO information was indeed publicly available; (4) assure that the Agency will not release similar personal information in response to present or future FOIA requests; and (5) commit that whenever the Agency receives a FOIA request that may implicate personal information of farmers, the relevant Agriculture Stakeholder would be allowed to review the records and determine whether the records should be withheld, and if the Agency determines the information should be released, the Agriculture Stakeholder would be given an opportunity to object to the release before the EPA responds to the request. *Id.* at 6.

41. *The EPA conducts an investigation on the initial release.* As stated in the EPA February 28 letter, in response to concerns raised by the Agriculture Stakeholders, the EPA initiated its investigation as to whether the initial FOIA release contained information that was not publicly available from states or other sources and that raised a privacy interest under the FOIA. The EPA reviewed all data elements in the CAFO information in order to understand the content of the CAFO information. After this review, the EPA organized the CAFO information into four categories:

- a. Group 1: CAFO information available to the public on an EPA website (ICIS-NPDES and PCS information as provided through ECHO) or a state website;
- b. Group 2: CAFO information subject to mandatory disclosure requirements under federal or state law;
- c. Group 3: CAFO information that does not implicate a "substantial" privacy interest; and
- d. Group 4: Remaining information.

With respect to Group 1 information, the EPA confirmed that the CAFO information collected from the eight states' websites was still publicly available. In addition, the EPA confirmed that CAFO information from five other states were also publicly available on those states' websites. For Group 2 information, the EPA identified all information subject to NPDES mandatory disclosure requirements or similar disclosure requirements under state law. For Group 3 information, the EPA reviewed any remaining data elements that did not implicate a "substantial" privacy interest. Examples of CAFO information in this category include dates or types of inspections conducted, permit status, and license reference numbers or other identification numbers. Finally, Group Four included all of the remaining CAFO information, which pertained to ten states.⁸ EPA's treatment of this information is described in detail in Paragraphs 54-59 of this Declaration.

42. *EPA's amended response to the FOIA requesters.* On April 4, 2013, the EPA provided the FOIA requesters, Earthjustice and Pew-NRDC, an amended response to their FOIA requests, attached as Exhibit 21, April 4, 2013, Amended Response. The Agency explained that following the concerns raised by the initial response, the Agency conducted a comprehensive review of the material released to determine whether the state-provided information was, as the EPA understood, all publicly available. After completing this review, the EPA stated that the Agency released all of the CAFO information pertaining to nineteen states⁹ because that information, as well as other April 4 released information, was either: (1) available to the public

⁸ The ten states are Arizona, Colorado, Georgia, Illinois, Indiana, Michigan, Montana, Nebraska, Ohio and Utah.

⁹ The nineteen states are Alabama, Arkansas, Florida, Iowa, Louisiana, Maryland, Maine, Mississippi, North Carolina, North Dakota, New Jersey, New York, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming. The amended April 4 response also released the other documents that were included in the January 31 and February 4 responses, including the consolidated spreadsheets of CAFO information from EPA's ICIS-NPDES and PCS data systems, information the EPA collected from eight states' websites, and consolidated spreadsheets from Region 3 and 5. Please note that in Footnote 1 of the April 4 EPA letter to the FOIA requesters and Agricultural Stakeholders, Missouri was included as one of the twenty-nine states for which the EPA released information. Mississippi should have been included in Footnote 1 instead of Missouri.

on the EPA or a state website, (2) subject to mandatory disclosure under federal or state law, or (3) did not contain information that implicates a “substantial” privacy interest. The EPA explained that because the CAFO information pertaining to the nineteen states is in the public domain or must be publicly noticed and/or available, there is no “substantial” privacy interest in the information, and therefore, Exemption 6 did not apply. The EPA determined, however, that a subset of information received from ten states¹⁰ was subject to Exemption 6’s protections; thus, the Agency withheld that information in its amended response. The information that the EPA withheld from these ten states, pursuant to Exemption 6, comprises the names and addresses of individuals (as opposed to business or facility names and locations, though facility names that include the individuals’ names were also redacted), telephone numbers, email addresses, and notations that relate to personal matters. *Id.* at 3.

43. The Agency also continued to withhold 474 records under Exemption 5’s deliberative process and attorney client privileges. *Id.* The withheld Exemption 5 information is not at issue in this lawsuit. At the end of the April 4 response, the Agency asked the requesters to return the initial response and destroy any copies of it. The Agency received returned copies from all of the FOIA requesters. *See* Exhibit 22, April 9, 2013, Letter from NRDC to the EPA Returning Compact Disc.

44. *The EPA notifies the Agriculture Stakeholders of the Agency’s investigation findings.* On April 4, 2013, the EPA sent a letter informing the Agriculture Stakeholders of its April 4 amended response to the two FOIA requests, attached as Exhibit 23, and addressing the concerns raised in the Stakeholders’ March 22 letter. In the April 4 letter, the EPA explained that it determined that CAFO information pertaining to nineteen states, as well as other information (see

¹⁰ The ten states are Arizona, Colorado, Georgia, Illinois, Indiana, Michigan, Montana, Nebraska, Ohio, and Utah.

Paragraph 42, footnote 9), was either (1) available to the public on the EPA or a state website, (2) subject to mandatory disclosure under state or federal law, or (3) did not contain information that implicates a “substantial” privacy interest. Accordingly, this CAFO information was not subject to withholding under the privacy protections of FOIA Exemption 6. Id. at 1. Specifically, the EPA explained to the Agriculture Stakeholders that the EPA identified six states where the released information was identical in content and format to the CAFO information on a particular state website.¹¹ Id. at 2. The Agency also released CAFO information pertaining to seven states where the information was almost identical in form and content to the information available on a state website.¹² The EPA retrieved information from two states directly from EPA’s web-based data systems.¹³ Finally, the Agency determined that CAFO information pertaining to four states was available through mandatory disclosure requirements of the NPDES regulations or similar state laws.¹⁴ Id. at 2.

45. The April 4 letter further explained that a subset of the CAFO information received from ten states¹⁵ was subject to Exemption 6, and therefore, the Agency amended its FOIA response to redact the exempted information. The EPA informed the Agriculture Stakeholders that it concluded that a subset of state-provided information implicates a “substantial” privacy interest that outweighed the public interest of disclosure; the Agency thus withheld this

¹¹ The six states are Alabama*, Arkansas*, Maryland*, Mississippi*, North Carolina, and Texas*. (* indicates that the EPA collected the CAFO information directly from the state’s website. See ¶ 35(a) of this Declaration.)

¹² Florida*, Iowa, Louisiana*, New Jersey*, Pennsylvania, Tennessee, and Wisconsin. (* indicates that the EPA collected the CAFO information directly from the state’s website. See ¶ 35(a) of this Declaration.) Although some states’ CAFO information was collected directly from those states’ websites, the EPA program office manipulated the information subsequent to its retrieval, which caused minor differences in form and content in the released information.

¹³ The two states are New York and Maine, as well as other consolidated spreadsheets derived from the ICIS-NPDES and PCS data systems.

¹⁴ The four states are Oregon, South Dakota, North Dakota, and Wyoming. The April 4 letter to the Agricultural Stakeholders indicated that the released information for North Dakota and Wyoming included a few additional items beyond information that was available through the disclosure requirements, but this information did not raise a “substantial” privacy interest. Thus, the EPA released the additional items.

¹⁵ The ten states are Arizona, Colorado, Georgia, Indiana, Illinois, Michigan, Montana, Nebraska, Ohio, and Utah.

information under FOIA Exemption 6. Id. The EPA withheld specific data elements for a subset of facilities when these data elements were not required to be publicly disclosed as part of the state or federal permitting process or were not available on a public website. The specific data elements are names and addresses of individuals (as opposed to business or facility names and locations, though facility names that include individuals' names were also redacted), as well as telephone numbers, email addresses, and notations unrelated to the operations. Id. at 2.

46. While concluding that certain CAFO information provided by the states required Exemption 6 protection, the EPA also determined that none of the remaining information warranted protection under Exemption 6 because the public interest in disclosure outweighed the privacy interests. This information included the number of animals, size and location of animal feeding operations, and other operational information. The EPA made this determination based on the following reasons: (1) the individual's expectation of privacy was diminished with regard to matters in which he or she is acting in a business capacity; and (2) even if there was a "substantial" privacy interest for withholding the number of animals, size and location of animal feeding operations, and other operational information, that interest is outweighed by the public's interest in disclosing such information because release would "shed light on the agency's performance of its statutory duties." Id. at 3. The April 4 letter explained that the public has an interest in understanding how the Agency and authorized states are implementing the following CWA requirements, which address pollution from point sources as well as nonpoint sources: CWA sections 101 (presenting the goal of the Act as restoration and maintenance of the physical, chemical and biological integrity of the nation's waters); 102 (development of comprehensive programs for preventing, reducing, or eliminating pollution); 104 (requiring programs that will conduct public investigations concerning pollution of any navigable waters and report on the

results of such investigations); 301 (requiring permits for point source discharges to meet technology-based and water quality-based effluent limitations); 303(c) (requiring establishment of water quality standards); 303(d)(requiring identification of impaired waters and establishment of total maximum daily loads for those waters); 303(e)(continuing planning process); 304(f)(identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution, including agricultural activities, including runoff from fields and crops); 305(b)(requiring bi-annual assessment of the nation's waters; 319 (nonpoint source management programs); 402 (permitting program). *Id.* at footnote 15; 33 U.S.C. §§ 1251, 1252, 1254, 1311, 1313(c), 1313(d), 1313(e), 1313(f), 1315(b), 1342.

47. Finally, in its April 4 letter, the EPA explained that it had re-examined the requirements set forth in the Privacy Act and the Act's implementing mechanisms within the Agency, including the Agency's Privacy Policy and Manual, and found that the Agency's amended response met its obligations under the Privacy Act. *Id.* at 3-4.

48. *EPA's second amended response to the FOIA requesters.* On April 30, 2013, the EPA amended its April 4 FOIA response to include additional responsive records that were inadvertently omitted and to redact additional information subject to Exemption 6 from CAFO information from Montana and Nebraska. The April 30 letter to the FOIA requesters is included as Exhibit 24. The second amended response reflected an additional quality assurance review that the EPA conducted to ensure that requesters obtain all responsive records, but none that was subject to FOIA Exemption 6 protections. In conducting the additional quality assurance review, the EPA discovered Nebraska's spreadsheet contained hidden rows of information that should have been redacted. The EPA also discovered that in four of the fifty-three worksheets on Montana's spreadsheet, some data elements required further redaction while other CAFO data

elements were unnecessarily withheld. The Agency made the appropriate modifications to the two states' CAFO information and requested that the FOIA requesters return the previously released compact discs (January 31 or February 4 and April 4) and that any copy of electronic or paper files on these compact disks be destroyed. Id. The Agency received returned copies from NRDC. Exhibit 25, May 6, 2013, NRDC letter to the EPA.

49. On April 30, 2013, the EPA notified Agriculture Stakeholders, ACWA, state permitting authorities, and the Environmental Council of the States to inform them of its second amended response to the two FOIA requests, which is included as Exhibit 26. The EPA informed these entities that CAFO information from Montana and Nebraska was further redacted to withhold names of individuals, telephone numbers, personal addresses, and notations about personal matters. The EPA also requested that entities who received copies of the responsive records return the previously released CDs, destroy all electronic or paper files containing this information, and confirm that all copies were destroyed. Id. The only Agriculture Stakeholders to voluntarily return the previously released information was the National Cattleman's Beef Association.

50. *Additional states' CAFO information collected but not released.* The EPA possesses additional CAFO information from seven states. The seven states are California, Idaho, Minnesota, Missouri, Nevada, Oklahoma, and Washington. In addition, the EPA obtained an updated spreadsheet with CAFO information from Pennsylvania. This information was not released to the initial FOIA requesters because the information was obtained by the Agency after the EPA received the Earthjustice and Pew-NRDC FOIA requests. The EPA has not released any of this information to the public. Exhibit 27, Seven Unreleased States' CAFO Information. Each state's information is attached under the following exhibit name, "Exhibit 27 ([state])."

51. *New FOIA requests seeking the same information as the two original requests.* Since its April 30, 2013 response to the two original FOIA requests, the EPA has received seven new FOIA requests that sought similar, if not the same, information as the two original FOIA requests. Exhibit 28, Subsequent FOIA Requests.

a. *EPA-HQ-2013-006737.* John Montandon of Dairy Business Communications submitted a FOIA request on June 4, 2013, seeking all CAFO information of dairy producers (owners and operators), which would include the CAFO information from the states that did not have their information released previously. Exhibit 28 at 1.

b. *EPA-HQ-2013-006604.* Ronald Clayton of DTN/Progressive Farmer submitted a FOIA request on May 13, 2013, seeking all records related to the related to the two original FOIA requests and response. Exhibit 28 at 3.

c. *EPA-HQ-2013-004128.* Bridget Huber of FairWarning submitted a FOIA request on March 5, 2013, seeking all records provided in response to the FOIA request made by Earthjustice. Exhibit 28 at 5.

d. *EPA-HQ-2013-008906.* On behalf of the intervenors of the above-captioned lawsuit, Environmental Integrity Project, Food & Water Watch, and Iowa Citizens for Community Improvement, Michele Merkel of Food & Water Watch submitted a FOIA request on August 7, 2013, seeking the same information sought by Earthjustice's FOIA request. Exhibit 28 at 6.

e. *EPA-HQ-2013-007430.* CJ Ciaramella of MuckRock News submitted a FOIA request on June 13, 2013, seeking all internal and external communications to and from the EPA National FOIA Office regarding the two original requests (from Earthjustice, NRDC, and the Pew Charitable Trusts). Exhibit 28 at 14.

f. *EPA-HQ-2013-006913.* Mike Smith of TruthinFood.com submitted a FOIA request on June 12, 2013, seeking all documents provided to the original requesters (Earthjustice, NRDC, and the Pew Charitable Trusts), including correspondence, in fulfillment of the FOIA requests. Exhibit 28 at 15.

g. *EPA-HQ-2013-004097.* Wei Zhang of the University of California submitted a FOIA request on March 7, 2013, seeking all datasets that contained animal numbers plus additional CAFO operational information. Exhibit 28 at 17.

52. *EPA's deferment of the seven subsequent FOIA requests.* The Plaintiffs served the EPA with a Complaint for Declaratory and Injunctive Relief on July 5, 2013. After receiving the Complaint, counsel for the EPA met and conferred with the plaintiffs regarding their motion for

a temporary restraining order. The EPA decided to temporarily defer pending and subsequent FOIA requests seeking the same farm information the AFBF Plaintiffs allege is subject to Exemption 6 (“Deferral Agreement”). EPA’s decision was based on the complexity of the Exemption 6 analysis before the District Court and the nature of the alleged privacy interests at issue. The AFBF plaintiffs filed a letter with the District Court on July 10, 2013 withdrawing their motion for a temporary restraining order without prejudice. (See Case No. 0:13-cv-01751, Docket No. 21). Exhibit 29, July 10, 2013, Letter from Gary Koch.

53. Once the Deferral Agreement was reached, the EPA informed all affected FOIA requesters, in an interim response, that the requests for the farm information would be deferred during the litigation and provided reference to the docket number so that requesters can monitor the progress of the litigation. Exhibit 30, Interim Responses to Six FOIA Requesters. The amended scheduling order for this case provides that the parties will complete briefing on cross motions for summary judgment by September 1, 2014, with a hearing and decision on the merits of the Exemption 6 issues to follow thereafter. (See Case No. 0:13-cv-01751, Docket No. 60). The parameters of the Deferral Agreement were memorialized in writing on February 5, 2014. Exhibit 31, February 5, 2014, Parameters of Agreement between the EPA and American Farm Bureau Federation et al.

IV. RECORDS RELEASED AND WITHHELD UNDER EXEMPTION 6

54. *Released CAFO information.* The EPA released in full (1) CAFO information pertaining to nineteen states and (2) consolidated spreadsheets from ICIS-NPDES and PCS and EPA Regions 3 and 5 because at the time of the release the information was either available to the public on the EPA or states’ websites, is subject to mandatory disclosure under state or federal law, or does not contain information that implicates a “substantial” privacy interest. See

¶¶ 42 and 44 of the Declaration. Thus, the EPA determined that this CAFO information was not subject to withholding under Exemption 6 of the FOIA. The CAFO information in the April 4 and April 30 response are attached as Exhibit 32, and each state's CAFO information is attached under the following exhibit name, "Exhibit 32 ([state])." Screenshots of state websites are attached as Exhibit 33, and each state's CAFO information is attached under the following exhibit name, "Exhibit 33 ([state])."

55. *Released CAFO information that was identical to states' websites.* As stated in Paragraph 44, above, the EPA released all of its CAFO information from six states because the released information was identical in content and format to the information on the public websites of the corresponding states. The six states are Alabama, Arkansas, Maryland, Mississippi, North Carolina, and Texas. For those states, websites where this information could be found are listed below.

- a. *Alabama:* The EPA collected Alabama CAFO information from the state's website, as well as received data from the state permitting authority. The released CAFO information for Alabama is attached as Exhibit 32 (Alabama), and was available on Alabama's publicly accessible website: <http://www.adem.state.al.us/programs/water/cafo.cnt>. Exhibit 33 (Alabama) is a screen shot of Alabama's website, where the information was found at the time of the April 4 FOIA response.
- b. *Arkansas:* The released CAFO information for Arkansas is attached as Exhibit 32 (Arkansas) and was available on Arkansas's publicly accessible website: <http://www.adeq.state.ar.us/home/pdssql/pds.aspx>. Exhibit 33 (Arkansas) is a screen shot of Arkansas's website, where the information was found at the time of the April 4 FOIA response. As stated in Paragraph 30 of this Declaration, the EPA collected Arkansas CAFO information directly from the state's public website.
- c. *Maryland:* The released CAFO information for Maryland is attached as Exhibit 32 (Maryland) and was available on Maryland's publicly accessible website: http://www.mde.state.md.us/programs/Land/SolidWaste/CAFOMAFO/Pages/Programs/LandPrograms/Solid_Waste/cafo_search/CAFO_old.aspx. Exhibit 33 (Maryland) is a screen shot of Maryland's website, where this information was found at the time of the April 4 FOIA response. As stated in Paragraph 30 of this

Declaration, the EPA collected Maryland CAFO information directly from the state's public website.

- d. *Mississippi*: The released CAFO information for Mississippi is attached as Exhibit 32 (Mississippi) and was available on Mississippi's publicly accessible website: http://opc.deq.state.ms.us/search_ai_alt.aspx#grid. Exhibit 33 (Mississippi) is a screen shot of Mississippi's website, where this information was found at the time of the April 4 FOIA response. As stated in Paragraph 30 of this Declaration, the EPA collected Mississippi CAFO information directly from the state's public website.
- e. *North Carolina*: The released CAFO information for North Carolina is attached as Exhibit 32 (North Carolina) and was available on North Carolina's publicly accessible website: <http://portal.ncdenr.org/web/wq/aps/afo/perm>. Exhibit 33 (North Carolina) is a screen shot of North Carolina's website, where this information was found at the time of the April 4 FOIA response.
- f. *Texas*: The released CAFO information for Texas is attached as Exhibit 32 (Texas) and was available on Texas's publicly accessible website: http://www2.tceq.texas.gov/wq_dpa/index.cfm. Exhibit 33 (Texas) is a screen shot of Texas's website, where this information was found at the time of the April 4 FOIA response. As stated in Paragraph 30 of this Declaration, the EPA collected Texas CAFO information directly from the state's public website.

56. *Released CAFO information that was nearly identical to states' websites*. As stated in Paragraph 44, above, the EPA released all CAFO information pertaining to seven states where the released information and the public state websites were almost identical in form and content. The seven states are Florida, Iowa, Louisiana, New Jersey, Pennsylvania, Tennessee, and Wisconsin. For those states, websites where this information could be found are listed below:

- a. *Florida*: The released CAFO information for Florida is attached as Exhibit 32 (Florida). The EPA collected Florida CAFO information from the state's website, as well as received data from the state permitting authority. This information can be downloaded from the state's website: <http://www.dep.state.fl.us/water/wastewater/facinfo.htm>.¹⁶ Exhibit 33 (Florida) is a screen shot of Florida's publicly available website, where the information was found at the time of the April 4 FOIA response. As stated in Paragraph 30 of this Declaration, the EPA collected Florida CAFO information directly from the state's public website. In addition to this website, all facilities, except for three, have NPDES permits, and therefore, subject to public disclosure requirements.

¹⁶ The CAFOs information on Florida's website includes industrial wastewater facilities in addition to the CAFO facilities released to the FOIA requesters.

- b. *Iowa*: The released CAFO information for Iowa is attached as Exhibit 32 (Iowa). The Agency obtained the CAFO information from the state permitting authority. The same CAFO information is available from the state website by performing a “facility search.” Additionally, the same CAFO information (and more) is available in downloadable reports, including the reports entitled “Basic AFO Data”, “Storage Structure and Animal Units” and “Geo Report”. These downloadable reports contain all the data elements and facility information that were released to the FOIA requesters. The released information is available on Iowa’s publicly accessible website: <https://programs.iowadnr.gov/animalfeedingoperations/Default.aspx>. Exhibit 33 (Iowa) is a screen shot of Iowa’s publicly available website, where the information was found at the time of the April 4 FOIA response.
- c. *Louisiana*: The released CAFO information for Louisiana is attached as Exhibit 32 (Louisiana) The Agency obtained facility information in Louisiana by extracting the CAFO information from the states electronic document management system, a web-based database. The released CAFO information for Louisiana is identical to what was available at the time of the FOIA request from the website but is in a different format. The website from which the Louisiana CAFO information was retrieved at the time of the April 4 FOIA response is: <http://www.deq.louisiana.gov/portal/DIVISIONS/WaterPermits/LPDESPermits.aspx>. and <http://edms.deq.louisiana.gov/app/doc/querydef.aspx>. In addition to being publicly available online, the released facility-specific information pertains only to those facilities with an NPDES permit and is therefore subject to public disclosure requirements. As stated in Paragraph 30 of this Declaration, the EPA collected Louisiana CAFO information directly from the state’s public website.
- d. *New Jersey*: The released CAFO information for New Jersey is attached as Exhibit 32 (New Jersey). The Agency obtained CAFO information from the state website through a downloadable Excel spreadsheet, which is updated periodically. The released information was an older version of what was publicly available online when the Agency confirmed which information is available on the states’ website: <http://www.state.nj.us/dep/dwq/database.htm> (the information is listed under the “active permit list (Excel format)” tab). Exhibit 33 (New Jersey) is a screen shot of New Jersey’s website where this information could be found at the time of the FOIA response. In addition to these websites, the released facility-specific information pertains only to those facilities with an NPDES permit and, therefore, is subject to public disclosure requirements. As stated in Paragraph 30 of this Declaration, the EPA collected New Jersey CAFO information directly from the state’s public website.
- e. *Pennsylvania*: The released CAFO information for Pennsylvania is attached as Exhibit 32 (Pennsylvania). The Agency obtained facility information from the state permitting authority. The same type of CAFO information is accessible on the state website by performing a search query in the Authorization Search Screen for

authorization type: "PAG-12 Concentrated Animal Feed Operations" and selecting two other search parameters, such as application type and program type: http://www.ahs.dep.pa.gov/eFACTSWeb/criteria_auth.aspx. After selecting search terms, the results are displayed and can be exported to an Excel spreadsheet. Selecting an individual search result will show more detailed information for that operation. Exhibit 33 (Pennsylvania) is a screen shot of Pennsylvania's website where this information can be found at the time of the April 4 FOIA response. In addition to these websites, the released facility-specific information pertains only to those facilities with an NPDES permit and is therefore subject to public disclosure requirements.

- f. *Tennessee*: The released CAFO information for Tennessee is attached as Exhibit 32 (Tennessee). The Agency obtained facility information from the state permitting authority. The released CAFO information contained two additional data elements, number of acres and number of animals that are not available online. These two data elements are not protected under Exemption 6. Exhibit 33 (Tennessee) is a screen shot of Tennessee's publicly available website, where the information was found at the time of the April 4 FOIA response: http://environment-online.state.tn.us:8080/pls/enf_reports/f?p=9034:34001:8736692714290.
- g. *Wisconsin*: The released CAFO information for Wisconsin is attached as Exhibit 32 (Wisconsin). The Agency obtained two versions of a spreadsheet from the state permitting authority, as well as previously state-submitted CAFO information to the EPA Region 5. The state's websites are updated periodically and contain a list of facilities that can be downloaded in a different file format than an Excel spreadsheet: http://dnr.wi.gov/topic/AgBusiness/data/CAFO/cafo_all.asp and <http://dnr.wi.gov/topic/AgBusiness/data/CAFO/>. Exhibit 33 (Wisconsin) is a screen shot of Wisconsin's website where this information can be found at the time of the April 4 FOIA response. In addition to these websites, the released facility-specific information pertains only to those facilities with an NPDES permit and is therefore subject to public disclosure requirements.

57. *Released CAFO information available on EPA's web-based data systems.* As stated in Paragraph 44, above, the EPA released all CAFO information from two states (Maine and New York) and consolidated spreadsheets where the information was derived from EPA's national NPDES data systems, ICIS-NPDES and PCS. The ICIS-NPDES and PCS's information are attached as Exhibit 32, (New York), (Maine), and (Consolidated Spreadsheets from EPA Data Systems). CAFO information entered into PCS or ICIS-NPDES data systems is publicly available either via the ECHO (for NPDES permitted facilities) or EnviroFacts (for unpermitted

facilities) web-based data systems, except for information that is classified as confidential business information, related to an ongoing enforcement action, or associated with inspection planning. As described in Paragraph 30, the EPA searched its data systems because New York and Maine's state employees referred the EPA to these data systems for their CAFO information.

58. *Released CAFO information subject to mandatory disclosure requirements under the NPDES regulations or similar state permitting program laws.* As stated in Paragraph 44, above, the EPA released all CAFO information pertaining to four states because this information was subject to mandatory disclosure requirements of the federal NPDES regulations or similar state laws. The four states are Oregon, North Dakota, South Dakota, and Wyoming. The EPA also released an EPA Region 3 consolidated spreadsheet of poultry facilities in the Delmarva Peninsula, including poultry facilities from Delaware, Maryland, and Virginia. The EPA Region 3 had gathered this information in the course of carrying out Regional enforcement activities, such as field investigations and online research of publicly available databases. The EPA Region 3 consolidated spreadsheet also contained state-provided information for facilities with federal and state permits, which are subject to mandatory disclosure under state law. As stated in Paragraph 9, section 402 of the CWA requires that a copy of each permit application and each permit issued be available to the public and be available upon request for the purpose of reproduction. 33 U.S.C. § 1342(j). The CAFO information is also subject to disclosure under federal regulations at 40 CFR § 122.42(e). See ¶ 9 and 40 C.F.R. §§ 122.21(i), 123.25(a)(4), 123.25(a)(13). These regulations require public disclosure of the following information: (1) the name of the owner or operator; (2) facility location and mailing address; (3) latitude and longitude of the production area (entrance of the production area); (4) a topographic map of the geographic area in which the CAFO is located showing the specific location of production area;

(5) specific information about the number and type of animals, whether in open confinement or housed under roof; (6) the type of containment and storage and total capacity for manure, litter, or process water; (7) the total number of acres under control of the applicant available for land application of manure, litter, or process wastewater; (8) estimated amounts of manure, litter, and process wastewater generated per year; (9) estimated amounts of manure, litter, and process wastewater transferred to another person per year; and (10) a nutrient management plan that at a minimum satisfies requirements in 40 C.F.R. § 122.42(e). See ¶ 10 and 40 C.F.R. § 122.21(i).

a. *Oregon*: The released CAFO information for Oregon is attached as Exhibit 32 (Oregon) and comprises three spreadsheets, which list many of the same facilities. The spreadsheets list operations with NPDES permits that meet EPA's Large CAFO size thresholds, as well as operations that fall below EPA's Large CAFO size thresholds but are required to obtain NPDES permit under state law. See Or. Admin. R. 603-074-0014.

Information is listed under the following column headings, among others:¹⁷ business name, contact name, mailing address, telephone number, latitude and longitude, industrial classification code, permitted number of animals and acres available. All of this information is requested by the state's permit applications. Oregon's CAFO permit public notice requirements make available to the public the name of the operation; the name of the operator or owner if different than the operator, as well as his or her mailing address and telephone number; the physical address of the operation; the type of operation; the number of animals proposed; the operation's land use compatibility statement, and its animal waste management plan. See Or. Admin. R. 603-074-0014, *referencing* the Oregon CAFO General Permit at 8.

The released CAFO information also included a column that indicated whether the facility was permitted, denoted by a "yes." The EPA released all of the information because it was required to be made available to the public or because the information did not implicate a "substantial" privacy interest under FOIA Exemption 6. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interests in disclosing this information outweighed the privacy interest.

b. *North Dakota*: The released CAFO information for North Dakota is attached as Exhibit 32 (North Dakota) and comprises one spreadsheet of state permitted, large animal feeding operations. Information is listed under the following column

¹⁷ Occasionally a term listed as a "column heading" in this document actually paraphrases a state spreadsheet column heading for clarity's sake, e.g., by spelling out an acronym used on a state spreadsheet.

headings, among others: name and address, production area location (latitude and longitude), number of animals confined, permitting status of a facility, and inspection information.

With an exception of the inspection information, all remaining CAFO information from North Dakota can be found within state approved water permits, copies of which North Dakota must provide to interested individuals. N.D. Admin. Code 33-16-01-07; see also 33-16-03.1-13. The remaining inspection information, such as types of inspection conducted and description; location identifying information, such as “QPS,” “TRSQ,” or “aerial photo”; and average weight, did not implicate a “substantial” privacy interest under FOIA Exemption 6. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interests in disclosing this information outweighed the privacy interest.

- c. *South Dakota*: The released CAFO information for South Dakota is attached as Exhibit 32 (South Dakota). The released CAFO information from South Dakota only comprises records of NPDES permittees. Information is listed under the following column headings, among others: facility [names], numbers of animals permitted, types of animals confined, NPDES permit status of the facility, county, and acres available for land application. All listed information must be disclosed as NPDES permit information.
- d. *Wyoming*: The released CAFO information for Wyoming is attached as Exhibit 32 (Wyoming). The released CAFO information from Wyoming only comprises records of NPDES permittees. Information is listed under the following column headings, among others: permittee and facility names, addresses, production area locations, outfall descriptions and NPDES permit status of the facility. With the exception of outfall descriptions (i.e., “outfall”), all listed information must be disclosed as NPDES permit information. Description of outfalls does not raise a privacy interest under FOIA Exemption 6.
- e. *EPA Region 3 consolidated spreadsheet of the Delmarva Peninsula poultry facilities*: The released CAFO information in this EPA Region 3 consolidated spreadsheet is attached as Exhibit 32 (Region 3 Consolidated Spreadsheet). The EPA created the consolidated spreadsheet from information obtained through various sources. Specifically, these sources include states’ websites, publicly accessible online databases, Google Earth, state permitting authorities, and EPA site visits and inspections.

The released CAFO information comprises records of poultry facilities in three states: Delaware, Maryland, and Virginia. The consolidated spreadsheet contains information under the following column headings, among others: latitude and longitude, parcel number, first and last name, permit status, capacity, permit type, integrator, farm name, animal type, date application was received, and storage volume.

All data elements that are on an NPDES permit application were released for facilities with an NPDES permit. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. All data elements that were available from Delaware, Maryland, and Virginia's websites were released. See http://dda.delaware.gov/nutrients/forms/2009/122009_Current%20CAFO%20List.pdf and http://dda.delaware.gov/nutrients/forms/2008/052108_CAFOList.pdf (for Delaware); http://www.mde.state.md.us/programs/Land/SolidWaste/CAFOMAFO/Pages/Programs/LandPrograms/Solid_Waste/cafo_search/CAFO.aspx (for Maryland); and <http://www.deq.virginia.gov/Programs/Water/LandApplicationBeneficialReuse/PublicNotices.aspx> (for Virginia).

All data elements that were obtained from an EPA site visit or inspection was released pursuant to disclosure requirements of section 308 of the CWA. For facilities in Maryland and Virginia, all information was released because of state mandatory disclosure requirements. See MD. CODE REGS. 26.08.04.09(N)(3) for Maryland and VA. CODE ANN. §§ 62.1-44.17:1(C), (D) for Virginia.

59. *The EPA withheld a subset of CAFO information from ten states under Exemption 6.*

Exemption 6 of the FOIA protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The EPA withheld a subset of information for some of the facilities from the ten remaining states: Arizona, Colorado, Georgia, Indiana, Illinois, Michigan, Montana, Nebraska, Ohio, and Utah. Below is a brief summary of CAFO information from each state that includes the source of the information, data elements, and information withheld under Exemption 6.

a. *Arizona:* The state permitting authority provided the Arizona CAFO information, which comprises one pdf spreadsheet listing both facilities with NPDES permits, as well as facilities with state issued permits.

Information is listed under the following column headings, among others: facility name, subject to an Arizona discharge permit, place ID, owner/contractor name, physical address, phone number, business type, animal type, CAFO class, and latitude/longitude coordinates.

The information listed is required by the NPDES permitting process and therefore, was released for facilities that had NPDES permits. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. State law requires that the names and addresses and other permit information from state permitted facilities

be publicly available. See Ariz. Rev. Stat. Ann. § 49-205(B) and (C). The EPA withheld telephone numbers for the facilities that did not have an NPDES permit. All other information listed on the state spreadsheets, such as “business type,” was released because the information did not implicate a “substantial” privacy interest under FOIA Exemption 6. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interests in disclosing this information outweighed the privacy interest. The Arizona CAFO information is attached as Exhibit 32 (Arizona).

b. *Colorado*: The state permitting authority provided the Colorado CAFO information, which comprises one spreadsheet listing both facilities with NPDES permits as well as those registered with the state under a state registration requirement for certain agricultural facilities.

Information is listed under the following column headings, among others: ID number; permittees’ name and address, content type, permit sub-type, facility name, and address; facilities’ name, content type, permit sub-type, facility name, and address; registered capacity; maximum capacity; and animal type.

For the facilities that had an NPDES permit, the EPA released all of the information because this information must be made available to the public through the NPDES permitting process. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. For all non-NPDES facilities, the EPA withheld permittees’ names and addresses (including facility names that contain individual names), but released the remaining information because it did not implicate a “substantial” privacy interest under FOIA Exemption 6. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interests in disclosing this information outweighed the privacy interest. The Colorado CAFO information is attached as Exhibit 32 (Colorado).

c. *Georgia*: The state permitting authority provided the Georgia CAFO information, which comprises six spreadsheets of animal operations (e.g. swine, dairy, and poultry). These spreadsheets list information from the state’s NPDES permitting program, its land application permitting program, and the state agriculture department licensing and registration programs.

Information is listed under the following column headings, among others: owners’ name, operation’s name, facility location, mailing address, telephone numbers, latitude/longitude coordinates, other information related to status of the operations’ permits, and other notes unrelated to a facility’s operation.

The EPA released information that is contained on an NPDES permit application for those facilities that had an NPDES permit. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. The EPA also released names, addresses, and telephone numbers for facilities that were covered by the state’s land application permitting program because state permit application information is also publicly

noticed. See Ga. Comp. R. & Regs. 391-3-6-.11(6); see also Ga. Code Ann. § 50-18-71. For these facilities with the state's land application system permits, the EPA withheld personal names in comments or notes, email addresses, and other notes unrelated to a facility's operation.

For facilities not on the NPDES or state land application permit spreadsheets, the EPA withheld individual names (including facility names that contain individual names), addresses, and telephone numbers. All other information was released because it does not implicate a "substantial" privacy interest under Exemption 6. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interests in disclosing this information outweighed the privacy interest. The Georgia CAFO information is attached as Exhibit 32 (Georgia).

d. *Illinois*: The EPA Region 5 provided the Illinois CAFO information, which is an Excel spreadsheet. The Illinois CAFO information was obtained as part of the response to the petition to withdraw the Illinois NPDES program and lists facilities permitted by the NPDES program, unpermitted facilities, and facilities registered with the Illinois Department of Agriculture.

Information is listed under the following column headings, among others: ID number, facilities' name and address, owner/operator name and address, animal type, animal number, latitude/longitude coordinates, regional office, inspection information, livestock maximum capacity, animal type, containment type, wastewater storage type, total storage volume, manure land application or transfer records, nutrient management plan status, watershed, distance from water of U.S., and additional notes.

The EPA released information contained on an NPDES permit application for those facilities that had an NPDES permit. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. The EPA withheld the following information for the remaining facilities: personal names (within the facility and owner/operator columns), mailing addresses other than the physical locations of the facilities (for example: P.O. Boxes within the facility street address column), and telephone numbers for facilities that did not have an NPDES permit.

The EPA released the other data elements, such as the dates of the approved nutrient management plans or inspection information, for the facilities without an NPDES permit because these data elements did not implicate a "substantial" privacy interest under Exemption 6. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interests in disclosing this information outweighed the privacy interest. The Illinois CAFO information is attached as Exhibit 32 (Illinois).

e. *Indiana*: The state permitting authority provided the Indiana CAFO information, which comprises a Excel spreadsheet of facilities with an NPDES

permit, facilities with a state issued permit, and facilities that received an exemption from the state permitting program requirements.

Information is listed under the following column headings, among others: ID numbers; operation name, address, and latitude/longitude coordinates; permit information about size, approval information, NPDES number, permit expiration and renewal date; listed animal information including animal type, finisher; and owner's name and owner contact information.

The EPA released information contained on an NPDES permit application for those facilities that had an NPDES permit. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. The EPA also released names of facilities with a state issued permit because that information was available on the state's website, accessible at: <http://www.in.gov/idem/4850.htm>. Exhibit 33 (Indiana) is a screenshot of the Indiana website where the information was found at the time of the FOIA responses.

For facilities with a state issued permit, the EPA withheld the facility owner's street mailing address and telephone numbers. The Indiana CAFO information is attached as Exhibit 32 (Indiana).

f. *Michigan*: The state permitting authority provided the Michigan CAFO information, which comprises five Excel spreadsheets. The spreadsheets include information about facilities with NPDES permits, facilities exempted from obtaining NPDES permits, and facilities subject to state agriculture department program requirements (i.e., Agriculture Environmental Assurance Program and Nutrient Management Strategy).

Information is listed under the following column headings, among others: contact or facility name, facility location, latitude/longitude coordinates, hydrologic unit code, number of animal units, water stewardship technician, verification status, permit status, and identification ID numbers.

The EPA released NPDES permit-related information for those facilities that had an NPDES permit. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. Exhibit 33 (Michigan) is a screenshot of Michigan's website where the information was also found to be publicly available at the time of the FOIA responses. The website is available at: http://www.michigan.gov/deq/0,1607,7-135-3313_3682_3713-96774--,00.html.

For facilities that did not have an NPDES permit, the EPA withheld individuals' names and facility names that include individual names. The information under the remaining column headings, such as facility location, latitude/longitude coordinates, hydrologic unit code, number of animal units, water stewardship technician, verification status, permit status, and identification ID numbers do not implicate a "substantial" privacy interest. The EPA also concluded that even if

some of these data elements potentially possessed a privacy interest, the public interests in disclosing this information outweighed the privacy interest. The Michigan CAFO information is attached as Exhibit 32 (Michigan).

g. *Montana*: The state permitting authority provided the Montana CAFO information, which comprises an Excel spreadsheet with fifty-three worksheets listing CAFOs with NPDES permits as well as unpermitted CAFOs.

Information is listed under the following column headings, among others: land owner's name, address, physical address (if different from mailing address), ID method, unique identifier, latitude/longitude coordinates, state permit status, and inspector notes.

The EPA released NPDES permit-related information for those facilities that had an NPDES permit because this information must be made available to the public through the NPDES permitting process. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. Exhibit 33 (Montana) is a screenshot of the Montana website, where the information was also found at the time of the FOIA responses. The Montana website is available at: <http://svc.mt.gov/msl/mtcadastral/>.

The EPA withheld information in the "validation" data column because the information was not related to the facility's operation. For facilities that did not have an NPDES permit, the EPA also withheld individual names and mailing addresses that were different from the physical locations of facilities as well as notes unrelated to a facility's operation. The remaining information, such as ID method, does not implicate a "substantial" privacy interest. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interest of disclosure outweighed the privacy interest. The Montana CAFO information is attached as Exhibit 32 (Montana).

h. *Nebraska*: The state permitting authority provided the Nebraska CAFO information, which comprises two Excel spreadsheets of facilities with NPDES permits, facilities with state permits under the Land and Water Fund program, and facilities exempted from permitting requirements.

Information is listed under the following column headings, among others: facility ID, name, address, size, latitude/longitude coordinates, NPDES permit, state operating license, construction or operating license, animal type and numbers, feeder type and numbers, point of contact's name, position, mailing address, telephone number, and other operational information.

The EPA released information contained on an NPDES permit application for those facilities that had an NPDES permit. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17.

The EPA withheld individual's names, mailing address, and telephone numbers for facilities with a state permit or facilities exempted from permitting requirements. The remaining information, such as information related to waste storage or disposal, does not implicate a "substantial" privacy interest. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interest of disclosure outweighed the privacy interest. The Nebraska CAFO information is attached as Exhibit 32 (Nebraska).

i. *Ohio*: The state permitting authority provided Ohio CAFO information, which comprises two Excel spreadsheets listing facilities with NPDES permits and facilities with permits from Ohio Department of Agriculture's Livestock Permitting Program. The state permitting authority also provided an Excel spreadsheet for manure spills in 2011.

Information is listed under the following column headings, among others: facility name, address, farm species, animal numbers, latitude/longitude coordinates, and additional notes. The information also contained manure spill information.

The EPA released information contained on an NPDES permit application for those facilities that had an NPDES permit and the information regarding manure spills since the information is related to a discharge. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. The EPA also released names and address of state permitted facilities because that information was available on the states' website available at: <http://www.epa.state.oh.us/dsw/cafo/index.aspx>. All released information was available on Ohio's publicly accessible website or did not implicate a "substantial" privacy (such as information listed under column headings entitled, not received, facility expanded, etc.). The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interest of disclosure outweighed the privacy interest. Exhibit 33 (Ohio) is a screenshot of the Ohio website, where the information was found at the time of the FOIA responses.

The EPA withheld one note relating to the status of a facility's finances. The Ohio CAFO information is attached as Exhibit 32 (Ohio).

j. *Utah*: The state permitting authority provided Utah CAFO information, which comprises two Word documents with lists of permitted and unpermitted large CAFOs.

Information is listed under the following column headings, among others: facility name, first and last name, address, county, telephone number, inspection dates, latitude/longitude coordinates, and animal numbers.

The EPA released information contained on an NPDES permit application for those facilities that had an NPDES permit. See 33 U.S.C. § 1342(b)(3), (j); 40 C.F.R. §§ 122.23(h), 124.10-17. The EPA also released inspection data because

the information does not implicate a “substantial” privacy interest. The EPA also concluded that even if some of these data elements potentially possessed a privacy interest, the public interest of disclosure outweighed the privacy interest.

The EPA withheld unpermitted facilities’ names of individuals (including facility names that contain individual names), mailing addresses, and telephone numbers. The Utah CAFO information is attached as Exhibit 32 (Utah).

PART V. EPA’S EXEMPTION 6 ANALYSIS

60. *Threshold analysis: personnel, medical, and similar files.* The EPA first determined whether the information was “personnel and medical and similar files” in order to meet the threshold requirement of Exemption 6. 5 U.S.C. § 552(b)(6). The EPA thoroughly evaluated every data element of the CAFO information and found that although the CAFO information predominantly pertains to facilities and facility operations, some of this information could directly or indirectly relate to individuals. Accordingly, the Agency concluded that the CAFO information satisfied the threshold requirement of Exemption 6.

61. *Identifying the privacy interests.* As part of the second step of its Exemption 6 analysis, the EPA determined whether there is a “substantial” privacy interest in the requested information. Because some of the CAFO information from the ten states was not publicly available on EPA or states’ websites or required for mandatory disclosure under a federal or state law, the EPA completed an exhaustive review to determine whether any of the CAFO information obtained from the ten remaining states raised a “substantial” privacy interest and, if so, whether the disclosure would constitute a clearly unwarranted invasion of personal privacy. In its review, the EPA evaluated each data element in the ten states and considered statements regarding the privacy of farmers in the Agriculture Stakeholders’ February 25 and March 22 letters. The EPA also identified any state laws or regulations that required state permitting

information to be released. If the EPA concluded that state permitting program information is subject to public disclosure, the Agency then cross referenced the public disclosure requirements against each data element to determine the whether a privacy interest existed. If a privacy interest was identified, then the Agency determined the weight of each privacy interest that each element should be afforded. The difference between this exercise and the analysis conducted for information released about the four states and the consolidated spreadsheets referred in Paragraph 58 is that not all data elements contained in the ten states' CAFO information were subject to mandatory disclosure requirements under state or federal law or available from the state's websites.

62. The Agency understood that a privacy interest of Exemption 6 only pertains to individuals and does not apply to corporations or businesses. While all information in the ten states pertained to the CAFO facilities, the EPA also took into consideration the privacy interests expressed in the Agricultural Stakeholder's February 25 letter. See ¶ 37 of this Declaration, Exhibit 18. Relevant to the privacy interest inquiry, the EPA considered the following statements made by the Agricultural Stakeholders in the February 25 letter: (1) farmers and ranchers live in close proximity to their animals; (2) the CAFO information could possibly be used by groups who "oppose our members' businesses and way of life for reasons largely, if not entirely, unrelated to the honorable goals and objectives of the [CWA]"; and (3) general privacy and security concerns regarding the release of the CAFO information. Id. Based on these expressed concerns, the EPA determined that a subset of ten states' CAFO information—the names and addresses of individuals (as opposed to business or facility names and locations, though facility names that include the individuals' names were also redacted), telephone

numbers, email addresses, and notations that relate to personal matters—may implicate a privacy interest under Exemption 6.

63. *Identifying the public interest in disclosure.* After identifying the potential privacy interests, the EPA then engaged in the third step of the Exemption 6 analysis by identifying the public interest in disclosing the information—specifically, how each data element sheds light on the Agency’s performance of its statutory duties. In the Withdrawal of the Proposed CAFO Reporting Rule, the Agency recognized that CAFOs play an important role in water quality planning due to the fact that they are potential sources of discharges of nitrogen, phosphorus, pathogens, and other pollutants. See Exhibit 6, 77 Fed. Reg. at 42,681. The EPA also acknowledged that “any CAFO information obtained by the EPA through existing sources will further enhance the CWA programs that are already in place to protect and restore water quality.” See Exhibit 34, Supplemental Response to Comments for the Proposed NPDES CAFO Reporting Rule at 2 (docket EPA-HQ-OW-2011-0188-1436). The public participation mandates throughout the CWA indicate a Congressional acknowledgement of the key role of an informed citizenry in helping achieve the goals of the Act. The paragraphs below specifically describe why public access to the information sheds light on the Agency’s performance of its statutory duties and is consistent with the objectives of the CWA.

64. “Public participation shall be “provided for, encouraged, and assisted” in “the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program” that the EPA or states establish under the CWA. 33 U.S.C. § 1251(e). Citizen participation in EPA’s development and enforcement of regulations and other programs, and decisions as to whether to such regulations or programs need revisions, is more effective if members of the public have access to the CAFO information on which the EPA bases its

decisions. As the EPA stated in the Proposed CAFO Reporting Rule, complete and accurate information allows governments, regulated communities, interest groups, and the public to make more informed decisions regarding ways to protect the environment. See 76 Fed. Reg. at 65,434. The EPA manages comprehensive programs, both regulatory and non-regulatory in nature, intended to address discharges and pollution from CAFOs and non-CAFO agricultural operations. Understanding EPA's information related to CAFO locations and basic operations allows the public to fully participate in the development, revision, and enforcement of EPA's regulatory and other programs, as required by CWA section 101(e).

65. Section 104 of the CWA authorizes the EPA to investigate and report to the public the causes of pollution problems and means of addressing them. 33 U.S.C. §§ 1254. Specifically, the EPA must "in cooperation with other Federal, State, and local agencies, conduct and promote ... surveys, and studies" relating to the causes and prevention of pollution, and the Agency may "collect and make available, through publication and other appropriate means, the results of" such surveys and studies. 33 U.S.C. §§ 1254(a)(1), (b)(1). Section 104 also charges the Agency with conducting "public investigations concerning the pollution of any navigable waters," and requires it to "report on the results of such investigations." Id. at § 1254(a)(3). The EPA is also authorized to "collect and disseminate" information about "pollution and the prevention, reduction, and elimination thereof." Id. at § 1254(b)(6). As described earlier in this Declaration, the EPA collects CAFO information nationwide, in cooperation with state CAFO permitting agencies, in order to understand and address potential water pollution problems from agricultural operations. Release of information about CAFO locations and operations, which may relate to the causes and prevention of pollution, is consistent with the disclosure provisions of Section 104.

66. Section 102(a) of the CWA requires the EPA to “prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters.” 33 U.S.C. § 1252(a). Members of the public could more effectively monitor whether the EPA is “comprehensively” addressing one significant source of pollution, discharges from agricultural operations, including CAFOs, if the EPA made available its information related to the locations and operations of such sources.

67. EPA’s central means of addressing discharges of pollutants from CAFOs is the CAFO NPDES permitting program and effluent guidelines for CAFOs. 40 C.F.R. §§ 122.23, 122.42; 40 C.F.R. part 412. Section 301 of the CWA prohibits discharges from point sources unless in compliance with a permit or other provisions of the Act, and requires the EPA to establish effluent limitations that are implemented through NPDES permits. 33 U.S.C. §§ 1311, 1342. Section 402 authorizes the NPDES permitting program for point sources, such as CAFOs. 33 U.S.C. § 1342. As explained in the Proposed CAFO Reporting Rule, knowing the locations of facilities and operational information that relate to how and why a facility may discharge is “essential” to carrying out NPDES program functions under section 402 of the CWA. See 76 Fed. Reg. 65,431, 65,436 (Oct. 21, 2011). These programmatic functions include: (1) evaluating the NPDES program effectiveness; (2) identifying and permitting CAFOs that discharge; (3) conducting education and outreach to promote best management practices; (4) determining potential sources of water quality impairments and taking steps to address those impairments; (5) estimating CAFOs loadings—by facility, by watershed, or other geographical area; and (6) targeting resources for compliance assistance or enforcement. Id. In light of the listed NPDES program functions, the EPA determined that members of the public have a public interest in obtaining certain CAFO information to ensure that the EPA is properly administering and

overseeing its CAFO NPDES program, pursuant to section 402 of the CWA. See also ¶ 9 of the Declaration.

68. The CAFO information will also shed light on EPA's efforts to restore watersheds outside of the NPDES permitting program. A key CWA program that addresses pollution from agriculture not regulated by NPDES permits is the award of grants under CWA section 319(h) to implement approved state and tribal nonpoint source management programs. 33 U.S.C. § 1329(h). Section 319(h) supports a variety of state and tribal nonpoint source programs, including technical assistance, financial assistance, education, training, technology transfer, demonstration projects, and regulatory programs. Id. Forty percent of section 319 grants have been used to control nonpoint source pollution from working farms and ranches. See EPA 841-F-05-001 "Agricultural Nonpoint Source Fact Sheet," available at: http://water.epa.gov/polwaste/nps/agriculture_facts.cfm. The public can only monitor whether these grant funds are being used effectively if they know the locations and sources of nonpoint source problems. For example, if members of the public learn of watersheds with high concentrations of animal feeding operations, where the operations lack adequate discharge controls but do not meet thresholds for permitting as a CAFO, they might urge the EPA or their state to direct section 319 funding towards these watersheds.

69. Members of the public could use the CAFO information to inform their participation in EPA's periodic issuance of guidelines for evaluating nonpoint sources of pollutants, as well as methods to control pollution resulting from specified activities, including agricultural activities, pursuant to CWA section 304(f). 33 U.S.C. § 1314(f). The EPA is required to consult with appropriate agencies as well as interested persons before issuing such guidelines. Id. Citizens are best positioned to advise the EPA with regard to new means of evaluating and controlling

pollutants from agricultural activities if they are familiar with the locations and operations of agricultural facilities, both those that are permitted and those that are not. They are also best positioned to monitor EPA's implementation of section 304(f) of the CWA if they are familiar with the information the EPA itself used to formulate its guidelines, processes and methods.

70. CAFO operation and location information would also inform the public's review of state water quality standards, and EPA's review of such standards, pursuant to section 303(c) of the CWA. 33 U.S.C. § 1313(c). Section 303(c) requires that states periodically review applicable water quality standards and, as appropriate, modify and adopt new standards. *Id.* The standards must be established to protect public health and welfare, enhance water quality, and serve the purposes of the Act, and take into account, among other things, the use of waterbodies for agricultural and other purposes. *Id.* at § 1313(c)(2)(A). The EPA is then charged with reviewing and approving or disapproving any revised or new standard and, if the state does not address the disapproval, the EPA must establish a new water quality standard in its place. *Id.* at § 1313(c)(3). Citizens are often deeply involved in monitoring the standards-setting and review process. For example, states must hold public hearings for the purpose of reviewing water quality standards and make available to the public any proposed revisions and supporting analyses. 33 U.S.C. § 1313(c)(1), 40 C.F.R. § 131.20. Citizens may also petition the EPA to establish new water quality standards. *See, e.g.,* Petition from the Ozark Chapter of the Sierra Club Regarding Defined Portions of the Mississippi and Missouri Rivers, at 1, 6, February 25, 2003 (requesting that the EPA exercise its authority under section 303(c) of the Clean Water Act to promulgate water quality standards applicable to the Mississippi and Missouri rivers, and citing in support the contamination of the rivers due, in part, to nutrients from agriculture), and the EPA Response to the Sierra Club Petition, [available at](#)

<http://water.epa.gov/scitech/swguidance/standards/SierraClub.cfm>. Citizens are able to participate in the standards-setting and review process more effectively if they can analyze EPA's information regarding the locations and operations of potential pollutant sources such as CAFOs and other agricultural operations.

71. The EPA's regulations implementing the CWA section 303(d) total maximum daily load ("TMDL") program recognize the need for and value of public input, as well. 40 C.F.R. § 130.7(c)(1)(ii). If effluent limitations established under CWA section 301(b) are not sufficient to implement a waterbody's section 303(c) water quality standards, states must identify that waterbody on their biennial CWA section 303(d) "impaired waters" list, establish a TMDL for pollutants in that waterbody in accordance with its priority rankings, and submit these listings and loadings to the EPA for approval. 33 U.S.C. § 1313(d). Calculations to establish TMDLs are subject to public review as defined in the state's continuing planning process. *Id.* Furthermore, if the EPA disapproves the state's lists or TMDLs, the Agency must establish new listings and TMDLs, and issue a public notice seeking comment on them. 40 C.F.R. § 130.7(d)(2). The Agency must consider public comments and make any appropriate revisions before transmitting the listings and TMDLs back to the state. *Id.* For example, in establishing the Chesapeake Bay TMDL, the EPA conducted extensive public outreach, including thirty-four public meetings, in which over 4,800 people participated, as well as frequent webinars that drew over 2,500 participants. *See* Chesapeake Bay TMDL, chapter 11, available at http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/CBayFinalTMDLSection11through14_final.pdf. The EPA also received and considered over 14,000 public comments on the TMDL. TMDLs may address pollutants from agriculture. *See, e.g., id.* at chapter 4 (addressing

agriculture as the single largest source of sediment and nutrient loadings to the Bay), available at http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/CBayFinalTMDLSection4_final.pdf. Public input and comments are more useful if the public understands the locations and basic information about potential sources of pollutants addressed in the TMDL.

72. The EPA is also charged with reviewing state continuing planning processes (“CPPs”) for all navigable waters within a state, which address, among other things, effluent limitations, TMDLs and the implementation of water quality standards. 33 U.S.C. § 1313(e). As discussed above, effluent limitations (such as the CAFO regulations), TMDLs, and water quality standards may all relate to pollutants from agricultural sources, including CAFOs. Citizens are better equipped to monitor state issuance of CPPs and EPA review of state CPPs if they are well informed about potential sources of the pollutants that the CPPs address.

73. Knowledge of locations and basic operating information at CAFOs and other agricultural facilities also assists the public in monitoring state integrated water quality assessment reports prepared under sections 305(b) and 303(d) of the CWA. 33 U.S.C. §§ 1313(d), 1315(b). Section 305(b) requires states to submit to the EPA biennial reports that address, among other things, a description of the water quality of navigable waters in the state; an analysis of the extent to which navigable waters in the state provide for the protection of wildlife; an analysis of the extent to which eliminating the discharge of pollution and a protective level of water quality has been or will be achieved, as well as recommendations of additional actions necessary to achieve such objectives; an estimate of the costs and benefits of achieving such objectives; and a description of the nature and extent of nonpoint sources of pollutants, recommendations as to programs that must be undertaken to control each category of nonpoint sources, and cost estimates of such programs. See 33 U.S.C. § 1315(b). Section 305(b) reports

are EPA's primary vehicle for informing Congress and the public about water quality conditions in states. See National Water Quality Inventory Report to Congress, available at <http://water.epa.gov/lawsregs/guidance/cwa/305b/index.cfm>. The breadth of the issues these reports address in each state, as well as the importance placed on them, render public involvement vital. Citizen review may be better informed, and hence more valuable, if members of the public are knowledgeable about the locations and operations of potential sources of pollutants in individual states. In the case of CAFOs, for example, citizens will only be able to evaluate the accuracy of the reports if they understand whether agricultural operations are located near water quality impairments, the sizes of such operations, and whether such operations have implemented water quality controls.

74. The September 2008 GAO Report, described in Paragraph 15 of the Declaration, recommended that the EPA develop a national inventory of permitted CAFOs. Disclosing the CAFO information would serve the public interest of ensuring the accuracy of EPA's national inventory of CAFOs.

75. *Balancing the privacy interests with public interests of the ten states' CAFO information.* After identifying the privacy interests and public interests of a subset of the ten states' CAFO information, the EPA balanced the two competing interests against one another to determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy. In exercising this balancing, the EPA considered the following factors relevant to the weight of the privacy interests: (1) CAFO owners or operators may live in close proximity to their animals; (2) the CAFO information could possibly be used by groups that "oppose [the Agricultural Stakeholder's] members businesses"; and (3) general privacy and security concerns regarding the release of the CAFO information. See ¶ 37 of the Declaration, Exhibit 18. The

Agency also considered that much of the information pertains to businesses, including sole proprietorships and closely-held corporations. In evaluating the weight of the public interest of disclosure, the EPA reviewed all of the information from the ten states and determined whether release of the information sheds light on the Agency's performance of its statutory duties. After balancing the two interests against each other, the EPA reached two conclusions.

76. First, the EPA found that a subset of CAFO information from the ten states that pertain to unpermitted facilities and facilities that are not subject to federal or state mandatory permitting disclosure requirements – such as individual names, phone numbers, email addresses, individual mailing addresses (as opposed to business or facility addresses) and notes unrelated to a facility's operation – implicates a “substantial” privacy interest that outweighed the public interest of disclosure. Therefore, the EPA withheld this CAFO information under Exemption 6. The EPA found that unpermitted facilities and facilities that are not subject to federal or state mandatory permitting disclosure requirements possessed a greater expectation of privacy than permitted facilities that were subject to mandatory disclosure permitting disclosure requirements. In addition, with respect to these facilities, the EPA found that individual names, phone numbers, email addresses, individual mailing addresses (as opposed to business or facility addresses) and notes unrelated to these facilities' operations did not provide insight into the Agency's implementation of the CWA; thus, the privacy interest of this subset of CAFO information from the ten states outweighed the public interest of disclosure. Given these considerations, the EPA concluded that disclosing information about facilities not subject to federal or state mandatory permitting disclosure requirements—specifically individual names, phone numbers, email addresses, individual mailing addresses and notes unrelated to these facilities' operations—

would constitute a clearly unwarranted invasion of personal privacy and, therefore, withheld the information pursuant to Exemption 6.

77. Second, the EPA determined that other CAFO information related to the environmental consequences of CAFO discharges – such as the number of animals, size of the operation, locations of animal feeding operations, and other operational information – did not implicate a “substantial” privacy interest. The EPA also concluded that even if these data elements possessed a privacy interest, the public interest in disclosing the number, size, and locations of animal feeding operations outweighed the privacy interest. The EPA determined this information was not subject to protection under FOIA Exemption 6 and, accordingly, released this CAFO information.

78. In reaching this conclusion, the EPA balanced the competing privacy and public interests. The number of animals, size of the operation, locations of animal feeding operations, and other operational information of facilities not subject to federal or state mandatory permitting disclosure requirements relate primarily to businesses or business operations. Although CAFO owners and operators may live in close proximity to their animals, the information sheds light on the Agency’s implementation of the CWA. See ¶¶ 63-74 of this Declaration. Facility location and basic operational characteristics that relate to how and why a facility may discharge is essential information needed to carry out the CWA. Id. at ¶ 19. The information helps citizens work in partnership with the EPA and states to protect and improve water quality and public health by informing the public about how effectively the EPA is administering its CWA authorities to address pollution from agriculture. Taking into account this significant public interest, the EPA concluded that the privacy interest of withholding information on the number of animals, size of the operation, locations of animal feeding

operations, and other operational information of facilities did not meet, let alone exceed, the weight of the public interests. Thus, the EPA found that disclosure would not constitute a clearly unwarranted invasion of privacy and information was not subject to protection under FOIA Exemption 6.

79. *Balancing the privacy interests with the public interests of the remaining CAFO information.* The EPA determined that CAFO information pertaining to (1) nineteen states, (2) the consolidated spreadsheets from the EPA data systems (ICIS-NPDES and PCS) and EPA Regions 3 and 5, and (3) ten states' NPDES or state permitted facilities that were subject to mandatory disclosure laws were not subject to the privacy protections of FOIA Exemption 6. This conclusion was based on EPA's thorough investigation, which confirmed that this CAFO information was publicly available on EPA's or state websites, subject to mandatory disclosure under state or federal law, or did not contain information that implicates a privacy interest. See ¶ 42 of the Declaration. The EPA also determined that this CAFO information was not obscure because: (1) for thirteen states, the information was identical or nearly identical in form and content on the publicly available websites at the time the information was released; (2) the EPA consistently releases NPDES permitting information subject to mandatory disclosure requirements through its publicly available data systems; and (3) members of the public can access the same information the EPA obtained from states through the mandatory disclosure requirements of state laws. Given these reasons, the EPA determined that CAFO information does not have a "substantial" privacy interest, and the CAFO facilities (and their owners) have no expectation of privacy on CAFO information that is well known or widely available within the public domain.

80. The EPA also determined that even if a privacy interest may exist, the weight of public interest in releasing this information (see Paragraphs 63-74 of this Declaration) far exceeded any privacy interest. After completing its balancing of the contrasting interests, the EPA determined that the information pertaining to the nineteen states and the consolidated spreadsheets from the EPA data systems and EPA Regions 3 and 5 were not subject to FOIA Exemption 6 protections, and accordingly, the Agency released the information in full to Earthjustice and Pew-NRDC.

In accordance with 28 U.S.C. § 1746, I affirm under penalty of perjury that the foregoing declaration is true and correct.

Executed this 17th day of April, 2014.



Deborah G. Nagle
Director of the Water Permits Division
U.S. Environmental Protection Agency